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Supreme Court, U.S.
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Supreme Court of the United States

STEPHEN J. WILLIAMS,

Petitioner,

vs.

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *Selling v. Radford* is binding on the states or whether the states should be free to craft their own rules on attorney reciprocal discipline?
2. Whether the First Department is systematically denying accused attorneys a hearing in reciprocal discipline cases?
3. Whether the Court of Appeals' systematic denial of appeals in attorney reciprocal discipline proceedings, when combined with the lack of due process in the First Department, violates the federal equal protection clause and deprives an attorney of due process?
4. Whether the First Department and the Court of Appeals were each obligated to "make an independent examination of the whole record" in order to assure themselves that "the judgment [of the foreign court] does not constitute a forbidden intrusion on the field of free expression"?

PARTIES TO THE PROCEEDING

The Applicant is Stephen J. Williams, an attorney who has been suspended without a hearing in the State of New York.

The Respondents in this proceeding are the Appellate Division of the Supreme Court of the State of New York, First Department ("First Department"); Presiding Justice Jonathan Lippman, Associate Justices Richard T. Andrias, John T. Buckley, James M. Catterson, David Friedman, Luis A. Gonzalez, Bernard J. Malone, Jr., George D. Marlow, Angela M. Mazzarelli, James M. McGuire, Eugene L. Nardelli, David B. Saxe, Joseph P. Sullivan, John W. Sweeny Jr., Peter Tom, Milton L. Williams (all in their capacity as justices of the First Department); Paul J. Curran (in his capacity as Chair of the Departmental Disciplinary Committee of the First Department); and Thomas J. Cahill (in his capacity as Chief Counsel of the Departmental Disciplinary Committee of the First Department).[1]

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[1] George D. Marlow and Joseph P. Sullivan are no longer associate justices of the First Department. Pursuant to Sup. Ct. R. 35.3, newly appointed justices Rolando T. Acosta and Karla Moskowitz should be substituted as Respondents. Similarly, Paul J. Curran is no longer Chair of the Departmental Disciplinary Committee and Thomas J. Cahill is no longer Chief Counsel of that Committee. Roy L. Reardon should be substituted as Chair and Alan W. Friedberg should be substituted as Chief Counsel.

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OPINIONS AND ORDERS BELOW

The opinions and orders of the Appellate Division of the Supreme Court of the State of New York, First Department ("First Department") and New York State Court of Appeals ("Court of Appeals") are reported at *In re Williams*, 33 A.D.3d 38, 819 N.Y.S.2d 508 (1st Dept., 2006), *leave to appeal dismissed in part, denied in part*, 8 N.Y.3d 858, 863 N.E.2d 109, 831 N.Y.S.2d 105 (2007), *appeal dismissed*, 8 N.Y.3d 1007, 870 N.E.2d 687, 839 N.Y.S.2d 448 (2007), *re-argument denied*, 9 N.Y.3d 919, 875 N.E.2d 892, 844 N.Y.S.2d 173 (2007).

All opinions and orders, including an unreported order of the First Department denying leave to appeal to the Court of Appeals, are set out in the Appendix starting at App. B.

JURISDICTION

This Court has jurisdiction to review by writ of certiorari "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had ... where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution ... or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution". 28 U.S.C. § 1257(a).

Petitioner seeks review of the First Department's order suspending his right to practice law in New York which, as demonstrated below, violated the First and Fourteenth Amendments to the United States Constitution.

This Petition is timely in that Justice Ginsburg has ordered that this Petition may be filed no later than 15 February 2008. (Application No. 07A487.)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The relevant portions of the U.S. Const. Amend. I and XIV, N.Y. Const. Art. VI, § 3, Judiciary Law § 90, 22 NYCRR §§ 603.3 and 691.3, D.C. Bar Rule XI, § 11 and Sup. Ct. R. 8 are set out in the Appendix starting at App. G.

STATEMENT OF THE CASE

A. Relevant proceedings in Connecticut

In a highly unusual non-adversarial proceeding, a Connecticut Superior Court judge, claiming the inherent power to do so despite Petitioner never having previously appeared before him, summarily suspended Petitioner's right to practice law in the State of Connecticut. (18 July 2005 order, App. A.) That order is presently on appeal before the Connecticut Appellate Court. *State of Connecticut v. Stephen J. Williams*. (Docket No. AC 27416.)

B. Relevant proceedings in New York

Based solely on the order of the Connecticut judge, and on principles of reciprocal discipline pursuant to

local court rule 22 NYCRR § 603.3, on 11 January 2006, the First Department's Departmental Disciplinary Committee ("Committee") sought the suspension of Petitioner's right to practice law in the state of New York. Petitioner responded by seeking a hearing as mandated by § 603.3.

On 27 July 2006, the First Department ordered that Petitioner's right to practice law in New York be suspended. *In re Williams*, 33 A.D.3d 38, 819 N.Y.S.2d 508 (1st Dept., 2006). That court's opinion restated the facts as alleged by the Committee and based upon those untested facts, concluded that "there was no infirmity of proof." 33 A.D.3d at 41, 819 N.Y.S.2d at 511. As to Petitioner's request for a hearing, the First Department simply ordered, without explanation, that Petitioner's "cross motion ... for a hearing should be denied." Id.

Petitioner raised prospectively his Federal due process concerns in his Demand for Hearing. Those concerns ripened when he was suspended without hearing by the First Department. Petitioner then fully argued his federal First and Fourteenth Amendment claims before that court in his motions for reconsideration and for permission to appeal to the Court of Appeals. (28 August 2006 Motion for Reconsideration; 5 September 2006 Motion for Permission to Appeal to the Court of Appeals.) Petitioner's federal claims were necessarily decided by the First Department when that court denied both motions. (16 November 2006 Order, App. C.)

Petitioner again sought permission to appeal – this time directly from the Court of Appeals. (5 January 2007 Motion for Permission to Appeal to the Court of

Appeals.) Petitioner's motion similarly raised in that court his First and Fourteenth Amendment claims. The Court of Appeals denied leave to appeal by order dated 15 February 2007. *In re Williams*, 8 N.Y.3d 858, 863 N.E.2d 109, 831 N.Y.S.2d 105 (2007). Petitioner then appealed as of right which, on 7 June 2007, was dismissed by the Court of Appeals "upon the ground that no substantial constitutional question is directly involved."[2] *Williams v. Departmental Disciplinary Committee for First Judicial Dept.*, 8 N.Y.3d 1007, 870 N.E.2d 687, 839 N.Y.S.2d 448 (2007). Because the Court of Appeals' *sua sponte* dismissal raised fresh Fourteenth Amendment due process, equal protection clause and First Amendment issues, Petitioner sought re-argument before the Court of Appeals to afford him the opportunity of addressing those new issues. (9 July 2007 Motion for Reargument.) Re-argument was denied on 18 September 2007. *Williams v. Departmental Disciplinary Committee for First Judicial Dept.*, 9 N.Y.3d 919, 875 N.E.2d 892, 844 N.Y.S.2d 173 (2007).

C. Relevant proceedings in the Supreme Court

On 10 December 2007, Justice Ginsburg ordered that this petition for writ of certiorari may be filed on or before 15 February 2008. (Application No. 07A487.)

In a separate matter, this Court recently denied Petitioner certiorari in a case predicated on the same

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[2] Dismissal on the basis that no substantial constitutional question is directly involved is a decision on the merits. *R.J. Reynolds Tobacco Co. v. Durham County, N.C.*, 479 U.S. 130, 138-9 (1986).

Connecticut events where Petitioner had been summarily suspended on principles of reciprocal discipline by the District of Columbia Court of Appeals pursuant to local court rule and without being afforded any hearing. *Williams v. District of Columbia Court of Appeals*, 128 S.Ct. 1075 (Mem.) (07-601, 2008). Because both suspensions are predicated upon the same factual events, and because similar principles are involved, judicial economy would be served by considering both matters in tandem. For this reason, on 8 February 2008, Petitioner sought rehearing of that order. That Petition for Rehearing is currently pending (Distributed for Conference of 28 March 2008).

REASONS FOR GRANTING THE WRIT

A. This Petition should be granted so that the Court can consider whether *Selling v. Radford* is binding on the states or whether the states should be free to craft their own rules on attorney reciprocal discipline.

Unlike in this Court and in the subordinate federal courts, the reciprocal recognition by state courts of discipline originating in other jurisdictions is a relatively new phenomenon. That phenomenon has been driven, in large measure, by Rule 22 of the Model Rules for Lawyer Disciplinary Enforcement as promulgated by the ABA's Standing Committee on Professional Discipline ("ABA Rule 22").[3] The rule provides as a policy goal that:

> If a lawyer suspended or disbarred in one jurisdiction is also admitted in another jurisdiction and no action can be taken against the lawyer until a new disciplinary proceeding is instituted, tried, and concluded, the public in the second jurisdiction is left unprotected against a lawyer who has been judicially determined to be unfit. Any procedure which so exposes innocent clients to harm cannot be

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[3] The ABA Model Rules for Lawyer Disciplinary Enforcement were adopted by the American Bar Association House of Delegates on August 11, 1993 and subsequently amended in 1995, 1999 and 2002. Model Rules for Lawyer Disciplinary Enforcement, 2007 Edition, copyright page.

> justified. The spectacle of a lawyer disbarred in one jurisdiction yet permitted to practice elsewhere exposes the profession to criticism and undermines public confidence in the administration of justice.

Commentary to ABA Rule 22.

Unfortunately, the immediacy and automaticity which the rule has as its goal is directly at odds with this Court's guidelines for reciprocal discipline as contained in *Selling v. Radford*, 243 U.S. 46, 51-52 (1917), that the attorney first be afforded an opportunity to raise certain specific defenses.

Some jurisdictions, such as the District of Columbia, and even this Court, have attempted to resolve this dilemma by providing for immediacy through provisions in their rules for automatic interim suspensions. D.C. Bar Rule XI, § 11(d); Sup. Ct. R. 8.1. Still other jurisdictions, which make no provision in their reciprocal discipline rules for the automatic interim suspension of attorneys, attempt to resolve the dilemma by streamlining their proceedings as much as possible. New York's First Department falls into this latter category. Unfortunately, as Petitioner will demonstrate in this Petition, the First Department is achieving this goal by denying attorneys any meaningful opportunity to be heard.

While Petitioner's parallel Petition, *Williams v. District of Columbia Court of Appeals*, 128 S.Ct. 1075 (Mem.) (2008), took issue with the denial of due process under an automatic interim suspension rule, and this Petition attacks the First Department's policy of imposing final reciprocal discipline without

affording an attorney a hearing, it is readily apparent that there is a much broader issue at play here which is whether *Selling*, decided in 1917, should in fact be the *de facto* due process standard applicable to the states.

Indeed, *Selling* was decided at a time when this Court believed that it had "no authority to re-examine or reverse as a reviewing court the action of the [disciplining state] in disbarring a member of the Bar of the courts". *Selling*, at 50. The *Selling* court was therefore only determining how *this Court* would handle reciprocal discipline from the states. Later, the Court broadened the *Selling* holding to encompass the handling of state discipline by subordinate federal courts. *Thread v. United States*, 354 U.S. 278, 281-282 (1957). *Selling* and *Thread* were necessitated because of the special relationship between the state bars and the federal bars in that "a lawyer is admitted into a federal court by way of a state court [but] is not automatically sent out of the federal court by the same route." Id. at 281. But that same special relationship does not exist between the states bars. Therefore, it should not surprise that this Court has never applied the *Selling* standard directly to the states. In fact, it was only as recently as 1967 that this Court determined that the Fourteenth Amendment afforded a lawyer in a state disciplinary proceeding any federal due process protections whatsoever. *Spevack v. Klein*, 385 U.S. 511, 514 (1967).

However, this has not stopped numerous jurisdictions, including New York and the District of Columbia, and even the ABA's Standing Committee on Professional Discipline, from assuming that this

Court's fixed *Selling* standard applies equally to both the state and federal bars. This is apparent from the almost identical wording contained in ABA Rule 22, D.C. Bar Rule XI, § 11(c), New York's 22 NYCRR § 603.3(c) and the reciprocal discipline rules of many other states.

It is this lack of clarity as to the breadth of this Court's reciprocal discipline standard which has created the current unsatisfactory situation whereby the states have not achieved the stated policy goal of preventing "a lawyer disbarred in one jurisdiction [from] practice[ing] elsewhere" yet at the same time, attorneys are being systematically denied procedural due process.

Therefore, the real question that this Court must address is whether the rigid standards for reciprocal discipline annunciated by this Court in *Selling* must be complied with by the states or whether the states should be free to adopt some other due process standard after consideration of the *Eldridge* factors. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

This Petition represents a "good vehicle" for the Court to examine, for the first time, reciprocal discipline among the states. The Petition is not fact-dependent. Indeed, Petitioner complains that he was not afforded a hearing before New York's courts at which to develop those facts. Rather, Petitioner was suspended in New York based solely on his discipline in Connecticut. There were no alternative grounds. Petitioner has carefully preserved all of the federal issues in his various filings before the First Department and again in the Court of Appeals. Those issues were necessarily decided by both New

York courts. And Petitioner is unaware of any other cases in the pipeline which address similar issues.

B. The First Department is systematically denying accused attorneys a hearing in *every* reciprocal discipline cases.

The Fourteenth Amendment mandates that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law".

Petitioner has a "property" interest in his license to practice law. *Barry v. Barchi*, 443 U.S. 55, 64 (1979). As a lawyer, Petitioner also has a "liberty" interest in "engag[ing] in [one] of the common occupations of life". *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972), quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Petitioner has a heightened "liberty" interest where, as is the circumstance here, his "good name, reputation, honor, or integrity is at stake *because of what the government is doing to him*". *Paul v. Davis*, 424 U.S. 693, 708 (1976) quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (Emphasis supplied in *Paul*).

"The fundamental requisite of due process of law is the opportunity to be heard". *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This applies no less to lawyers. *Ex parte Garland*, 4 Wall. 333, 378 (1866). "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence." *Zauderer v. Office of*

Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 671 (1985) (Brennan, J., concurring in part, dissenting in part), quoting *In re Oliver*, 333 U.S. 257, 273 (1948). See also *In re Ruffalo*, 390 U.S. 544, 550 (1968), *modified on other grounds*, 392 U.S. 919 (1968). quoting *Randall v. Brigham*, 7 Wall. 523, 540 (1868) ("notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence.").

The First Department's rule 22 NYCRR § 603.3 provides in part that:

> When a verified statement setting forth evidentiary facts for any defense to discipline and a demand for hearing have been duly filed, no discipline shall be imposed without affording the attorney an opportunity for hearing.

This court rule implements New York Judiciary Law § 90(6) which itself mandates that "[b]efore an attorney or counsellor-at-law is suspended or removed ... he must be allowed an opportunity of being heard in his defense."

Yet despite the mandatory nature of 22 NYCRR § 603.3(b), and despite the clear mandate of the legislature as embodied in Judiciary Law § 90(6), there have been only two published instances where the First Department has permitted a hearing to take place in a reciprocal disciplinary matter. In fact, the First Department has not allowed a hearing to be held in almost ten years. See *In re Lillard*, 255 A.D.2d 88, 689 N.Y.S.2d. 474, 475 (1st Dept. 1999). The only other occasion when the First Department

ordered a hearing was 28 years ago in what appears to have been the very first such case. See *In re Molliver*, 77 A.D. 36, 432 N.Y.S.2d 376 (1st Dept. 1980). There have been approximately 115 reciprocal discipline cases in the First Department since *Molliver* with 10 such cases having been decided in just the past year. Yet *none* of the five justices on the panel that disciplined Petitioner has *ever* permitted a hearing to be held in a reciprocal disciplinary matter.[4]

There are more attorneys registered with addresses in the First Department, which encompasses the busy Manhattan business district, than there are in the other three judicial departments combined.[5] Yet

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[4] Interestingly, the 1980 court recognized that a hearing was a "right". *In re Molliver*, 77 A.D. at 37, 432 N.Y.S.2d at 376 ("Molliver then availed himself of the right, under [§ 603.3], to demand a hearing for the purpose of raising certain defenses to the New York disbarment proceeding"). That court also recognized that the §603.3 hearing "is in fact a hearing contemplated under Section 90 of the Judiciary Law". 77 A.D. at 38, 432 N.Y.S.2d at 377. As this was the first prosecution pursuant to the First Department's § 603.3, this is powerful evidence of the legislative intent of the justices of the First Department in drafting § 603.3 that the hearing be mandatory as required by Judiciary Law § 90(6). See also the First Department's second § 603.3 case noting the procedure for demanding a hearing. *In re Reiss*, 119 A.D.2d 1, 5, 505 N.Y.S.2d 604, 606 (1st Dept. 1986) ("Ordinarily, a hearing would be required under 22 NYCRR § 603.3(b), on respondent's verified statement interposing a defense provided by subdivision (c) of § 603.3.")

[5] First Department, 78,238; Second Department, 46,593; Third Department, 9,321; Forth Department, 12,944; Total by department, 147,096. An additional 81,964 attorneys are registered with addresses outside of the state of New York (including Petitioner and many others who live within commuting distance of Manhattan). Twenty-ninth Annual

by comparison, the Second Department, which includes surrounding counties such as Kings, Queens, Nassau, and Westchester, and which in 22 NYCRR § 691.3 has a very similar rule on reciprocal discipline, has ordered that numerous hearings be held in just the past few years. In fact, Petitioner has been unable to find one single instance where the Second Department has failed to afford a hearing where an attorney appeared and sought a hearing.

There can be only one plausible explanation for the complete absence of hearings in the First Department – the systematic denial of every accused attorney's due process right to a meaningful hearing by the justices of the First Department. This is even more apparent in light of the mandates contained in Judiciary Law § 90(6) and 22 NYCRR § 603.3(b) which *require* a hearing prior to imposing discipline. Yet the justices of the First Department have consistently denied hearings to every other accused attorney without explanation just as they denied Petitioner a hearing.[6] Clearly, the intent of the First Department is to impose reciprocal discipline based solely on a showing of foreign discipline and without any genuine consideration of due process.

There are other indicators of this policy. For example, 22 NYCRR § 603.3 limits a lawyer's

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Report of the Chief Administrator of the Courts for Calendar Year 2006, Appendix D, p. 46.

[6] Discriminatory treatment may be demonstrated through "statistical disparities [which] warrant and require a conclusion that [is] irresistible, tantamount for all practical purposes to a mathematical demonstration". *McCleskey v. Kemp*, 481 U.S. 279, 293, note 12 (1987) (internal quotes and citations omitted).

defenses in reciprocal discipline matters to those same three defenses permitted by this Court in *Selling v. Radford*. The first of those defenses is that "the procedure in the foreign jurisdiction was so lacking in notice and opportunity to be heard as to constitute a deprivation of due process". Id., 243 U.S. at 51. This limitation is replicated, almost verbatim, in 22 NYCRR § 603.3(c)(1). Yet, inexplicably, the First Department in its decisions applying § 603.3(c)(1), has further restricted its rule to "lack of notice constituting a deprivation of due process". *In re Williams*, 33 A.D.3d at 41, 819 N.Y.S.2d at 510. The "opportunity to be heard" has been completely exorcised from the First Department's rule. Not surprisingly, Petitioner is unaware of any case where an attorney has met his burden under the First Department's emasculated standard.[7]

This Court's second *Selling* standard has similarly been copied, almost verbatim, into the First Department's rule:

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[7] First Department's opinion cites to *In re Power*, 3 A.D.3d 21, 23, 768 N.Y.S.2d 455 (1st Dept., 2003), as authority. 33 A.D.3d at 41, 819 N.Y.S.2d at 510. That case, in turn, cites *In re Meaden*, 263 A.D.2d 67, 697 N.Y.S.2d 285, 286 (1st Dept., 1999). *Meaden* contains neither citations nor argument in support of that court's emasculation of attorneys' procedural due process rights. The *Meaden* standard is applied in numerous other First Department cases and is still being applied today. See, for example, *In re Gentile*, 46 A.D.3d 53, 844 N.Y.S.2d 197, 198 (1st Dept. 2007), decided October, 2007. Furthermore, *In re Oliver*, 333 U.S. at 273, cited by the reciprocal discipline case of *In re Ruffalo*, 390 U.S. at 551, makes clear that the Court uses the phrase 'notice and opportunity to be heard' as a euphemism for procedural due process and not in the narrow literal sense with which the First Department attempts to apply it.

> that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not, consistent with its duties, accept as final the finding in the foreign jurisdiction as to the attorney's misconduct.

22 NYCRR § 603.3(c)(2). Yet without ever affording Petitioner a hearing to address this issue, the First Department flatly conclude that there "was no infirmity of proof." *In re Williams*, 33 A.D.3d at 41, 819 N.Y.S.2d at 511. Nor is Petitioner alone. See, for example, the recent case of *In re Burton*, 39 A.D.3d 46, 49, 831 N.Y.S.2d 32, 35 (1st Dept., 2007), *leave to appeal denied*, 9 N.Y.3d 818, 881 N.E.2d 839 (2008), where the First Department similarly concluded that "respondent [has not] made any showing that the factual findings in the Connecticut disciplinary proceedings suffered from an infirmity of proof" despite that court having denied Ms. Burton the hearing she requested so that she could make that showing. Petitioner is unaware of any case since the implementation of the First Department's reciprocal discipline rule in 1975, where the First Department has not reached the same conclusion.

Perhaps it would be acceptable to deprive an attorney of his protected liberty and property interests without a hearing if there were nothing to be considered at that hearing. *Gilbert v. Homar*, 520 U.S. 924, 933 (1997). However, the First Department's reciprocal discipline rule does afford the attorney the right to raise three specific defenses. 22 NYCRR § 603.3(c). Therefore, procedural due process mandates that the attorney be provided a

hearing at which he may be heard on those three defenses. *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 7 (2003). The First Department is not affording attorneys that hearing.

C. The Court of Appeals' systematic dismissal of appeals in attorney reciprocal discipline proceedings, when combined with the lack of due process in the First Department, violates the federal equal protection clause of the Fourteenth Amendment and deprives an attorney of due process as also guaranteed by that amendment.

Following the imposition of reciprocal discipline by the First Department, Petitioner sought leave to appeal to the Court of Appeals which was refused by both the First Department and the Court of Appeals. 16 November 2006 order, App. C; *In re Williams*, 8 N.Y.3d 858, 863 N.E.2d 109, 831 N.Y.S.2d 105 (2007). Petitioner then appealed as of right. The Court of Appeals dismissed Petitioner's appeal *sue sponte*. *Williams v. Departmental Disciplinary Committee for First Judicial Dept.*, 8 N.Y.3d 1007, 870 N.E.2d 687, 839 N.Y.S.2d 448 (2007).

Among those areas where the Court of Appeals has mandatory jurisdiction are matters "wherein is directly involved the construction of the constitution of the state or of the United States". N.Y. Const. Art. VI, § 3.b(1). Yet despite jurisdiction being mandatory, the Court of Appeals has gone from considering approximately half of appeals predicated

on a constitutional basis to dismissing the vast majority of such appeals in more recent years. Compare Buchsbaum, *Appeal as of Right to the New York Court of Appeals on Constitutional Grounds*, 24 N.Y.U.L. Quarterly Rev. 158 (1949); 2006 Annual Report of the Clerk of the Court to the Judges of the Court of Appeals of the State of New York, p. 3 and appendix 4.

This change is not due to any change in the law. The constitutional basis for appeal did not change in the interim period. Rather, this change is due to a policy shift within the Court of Appeals:

> January 1, 1986 was Independence Day for the New York State Court of Appeals. On that date, New York's highest court gained almost total discretion over its civil docket through an amendment to the statutory provisions governing its appellate jurisdiction.

Bierman, *When less is more: Changes to the New York Court of Appeals' Civil Jurisdiction*, 12 Pace L. Rev. 61 (1992).

Petitioner's appeal had been dismissed, without opinion, "upon the ground that no substantial constitutional question is directly involved." *Williams v. Departmental Disciplinary Committee for First Judicial Dept.*, 8 N.Y.3d 1007, 870 N.E.2d 687, 839 N.Y.S.2d 448 (2007). Yet in the First Department, and again before the Court of Appeals in his Motion for Leave to Appeal, Petitioner had challenged the constitutionality of the First Department's application of 22 NYCRR § 603.3. A constitutional challenge to a rule is a "question

[which] involves directly and necessarily the construction of the Constitution." *Valz v. Sheepshead Bay Bungalow Corp.*, 249 N.Y. 122, 132, 163 N.E. 124, 127 (1928).

Nor can there be any doubt that Petitioner's challenge raised a substantial constitutional question. Neither the First Department's reciprocal discipline rule, nor any other department's reciprocal discipline rule, has ever been considered by the Court of Appeals despite numerous attempts by attorneys to challenge those rules. Just in the First Department, see *In re Burton*, 39 A.D.3d 46, 831 N.Y.S.2d 32 (1st Dept., 2007), *leave to appeal denied*, 9 N.Y.3d 818, 881 N.E.2d 839 (2008); *In re Pu*, 37 A.D.3d 56, 826 N.Y.S.2d 43 (1st Dept., 2006), *leave to appeal denied and appeal dismissed*, 8 N.Y.3d 877, 864 N.E.2d 617, 832 N.Y.S.2d 487 (2007); *In re Lowell*, 14 A.D.3d 41, 784 N.Y.S.2d 69 (1st Dept., 2004), *appeal dismissed*, 4 N.Y.3d 846, 830 N.E.2d 320, 797 N.Y.S.2d 421 (2005), *and leave to appeal denied*, 5 N.Y.3d 708, 836 N.E.2d 1151, 803 N.Y.S.2d 28 (2005); *In re Edelstein*, 290 A.D.2d 189, 737 N.Y.S.2d 592 (1st Dept., 2002), *appeal dismissed*, 98 N.Y.2d 670, 774 N.E.2d 223, 746 N.Y.S.2d 458 (2002); *In re Kramer*, 235 A.D.2d 87, 664 N.Y.S.2d 1 (1st Dept., 1997), *leave to appeal denied*, 91 N.Y.2d 805, 691 N.E.2d 632, 668 N.Y.S.2d 560 (1998), *leave to appeal dismissed*, 93 N.Y.2d 883, 711 N.E.2d 639, 689 N.Y.S.2d 425 (1999); *In re Friedman*, 196 A.D.2d 280, 609 N.Y.S.2d 578 (1st Dept., 1994), *appeal dismissed*, 83 N.Y.2d 888, 635 N.E.2d 295, 613 N.Y.S.2d 126 (1994). The same result is found when examining cases originating in the other three departments. In the only reciprocal discipline case to *ever* be considered by the Court of Appeals, that

court carefully avoided reaching the reciprocal discipline issue. *In re Padilla*, 67 N.Y.2d 440, 448, 494 N.E.2d 1050, 1054, 503 N.Y.S.2d 550, 554 (1986). As a consequence, not one challenge to the constitutionality of New York's reciprocal discipline rules has ever been decided by the Court of Appeals despite there having now been well in excess of 300 reciprocal discipline cases in that state. Significant constitutional challenges on an important topic which has never been addressed by New York's highest court cannot be considered insubstantial. Compare *N.Y. Public Interest Research Group, Inc. v. New York State Thruway Auth.*, 77 N.Y.2d 86, 89, 565 N.E.2d 1259, 1260, 564 N.Y.S.2d 708, 709 (1990) ("The constitutional issue presented had been resolved by our prior decision ... concerning an essentially identical statute, and therefore, was insubstantial".); *Matter of David A. C.*, 43 N.Y.2d 708, 709, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977) ("The purportedly direct and dispositive constitutional issues underlying this appeal are no more than a restatement of questions whose merit has been clearly resolved against appellant's position".); *Tabankin v. Codd*, 40 N.Y.2d 893, 357 N.E.2d 1017, 389 N.Y.S.2d 362 (1976) ("Since the constitutional issues on the basis of which this appeal is taken are but a restatement of questions whose merit has been clearly adjudicated against appellant's position..., they must be held to lack the requisite substantially to sustain this appeal as of right").

It is evident from the number of constitutionally based appeals now being dismissed in comparison to historical data, as well as statements made by the Court of Appeals regarding its perceived roll, that

the Court of Appeals has transformed itself into a certiorari court, choosing its docket even where that choice might not necessarily comport with constitutional mandates.

One commentator said of this policy shift that

> the Court of Appeals' shift in emphasis away from an error-correction function can be described as dramatically altering the nature of appellate justice in New York. The Appellate Division, previously subject to more scrutiny from the Court of Appeals, now exists as the ultimate arbiter in most cases.

Bierman, *When less is more: Changes to the New York Court of Appeals' Civil Jurisdiction*, 12 Pace L. Rev. 61, 95 (1992). In fact, shortly following the change in rolls, the Court of Appeals justified that change by saying that:

> Unlike this court which, with few exceptions, passes on only questions of law, intermediate appellate courts are empowered to review questions of law and questions of fact. They do so in both civil cases and criminal cases. Indeed, this unique factual review power is the linchpin of our constitutional and statutory design intended to afford each litigant at least one appellate review of the facts.

People v. Bleakley, 69 N.Y.2d 490, 493-4, 508 N.E.2d 672, 515 N.Y.S.2d 761 (1987) (citations omitted).

But the Appellate Division's role as regards attorney disciplinary matters is unlike any other. In a system

which predates the changes within the Court of Appeals, the Appellate Division exercises original jurisdiction in attorney disciplinary matters. Judiciary Law § 90(2). Therefore, there can be no intermediate level review.

And for whatever reason, the Court of Appeals has shown itself unwilling to consider challenges to the Appellate Division's rules on reciprocal discipline. The same type of statistical analysis which demonstrates that the First Department is systematically denying all accused attorneys a meaningful hearing in reciprocal discipline matters also demonstrates that the Court of Appeals is systematically denying those same attorneys a meaningful appeal. This is evident from the sheer number of attorney appellants who have been denied leave to appeal or have had their appeals dismissed by the Court of Appeals. As regards attorney reciprocal discipline in New York, the appellate "linchpin" of at least one appellate review is now broken.

This Court said in *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. 74, 80 (1930):

> As to the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance.

The Court later explained "that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State

to provide appellate review". *Lindsey v. Normet*, 405 U.S. 56, 77 (1972).

But the central point of Petitioner's appeal to the Court of Appeals was that he was *not* afforded a full and fair hearing on the merits. The failure of New York to provide Petitioner with a meaningful opportunity for appeal under these circumstances is a violation of Petitioner's federal due process rights. This failure is particularly troubling as it denied Petitioner a state forum to raise his *federal* constitutional claims. Indeed, principles of comity are predicated upon the state being willing to provide an appropriate forum to address federal claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 847 (1999).[8]

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[8] New York also systematically denies attorneys a forum to raise state law claims. For example, the Court of Appeals has never considered whether the department's reciprocal discipline rules as applied are compatible with the requirement of Judiciary Law 90(6) that "[b]efore an attorney or counsellor-at-law is suspended or removed ... he must be allowed an opportunity of being heard in his defense." See footnote 4. Nor has the Court of Appeals ever considered whether, in a reciprocal discipline case, Judiciary Law 90(2) still requires that the Appellate Division must determine guilt for itself. The First Department has said that "[i]n the absence of a defense under 22 NYCRR § 603.3(c), [the Appellate Division] conclude[s] that the imposition of reciprocal discipline is appropriate." *In re Powers*, 281 A.D.2d 52, 55, 722 N.Y.S.2d 232, 235 (1st Dept. 2001). Yet the Court of Appeals has previously made clear that "the power to sanction [must be] premised on a finding of guilt by the Appellate Division". *In re Padilla*, 67 N.Y.2d at 447, 494 N.E.2d at 1053-4, 503 N.Y.S.2d at 554. See also *In re Nuey*, 61 N.Y.2d 513, 463 N.E.2d 30, 474 N.Y.S.2d, 714, 715 (1984) ("A finding by the court that an attorney "is guilty" of professional misconduct or of one of the other statutorily specified acts is a prerequisite to interference with the attorney's right to practice his or her profession. Without such an adjudication of guilt by it, made on the basis of

Furthermore, the refusal of the New York courts to engage in the weighing of factors required by *Mathews v. Eldridge*, 424 U.S. at 334-5, in determining what procedure is appropriate in a reciprocal disciplinary proceeding also violates due process. In fact, attorneys require *heightened* protections yet are now the *only* parties in New York who are denied any sort of meaningful appellate review. In a quasi-criminal prosecution of an attorney, there is no separation of powers as would normally be expected. Nor is there the normal separation of functions where the investigative, judicial and fact finding functions are separated. *In re Murchison*, 349 U.S. 133, 137 (1955). The prosecutors are employed by, and answerable to, the justices of the Appellate Division. In fact, the justices, or their brethren, are often considered to be the victims.[9] These are all unusual characteristics which increase the "risk of an erroneous deprivation" and which call for "additional or substitute procedural safeguards" to protect an accused attorney. Instead, the New York courts have singled out attorneys for less protection than every other litigant in that state. Needless to say, the lack of a logical or reasonable basis for denying attorneys appellate review violates the Fourteen Amendment's Equal Protection Clause.

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evidence and exhibits, if any, produced at the panel hearings (which are not shown by the record to have been before the court in this instance), the action of the Appellate Division in granting the committee's request [suspending the attorney] was premature.")

[9] Petitioner was disciplined in New York, in part, for "undignified or discourteous conduct degrading to a tribunal". *In re Williams*, 33 A.D.3d at 41, 819 N.Y.S.2d at 511.

> When an appeal is afforded ... it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating The Equal Protection Clause.

Lindsey v. Normet, 405 U.S. at 77.

> There is no good reason why members of the legal profession, who have done so much to protect the constitutional rights of others, should be deprived of justice with due process in hearings and appeals.

Mildner v. Gulotta, 405 F.Supp. 182, 201-202 (E.D.N.Y., 1975) (Weinstein, J., dissent), *affirmed*, 425 U.S. 901 (1976). [10]

D. The suspension of Petitioner without hearing and the dismissal of his appeal without consideration are incompatible with this Court's mandate that "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'"

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[10] Petitioner's case differs from *Mildner* in that the attorneys in *Mildner* were at least afforded a hearing. But even so, one judge of the three judge panel wrote a strident dissenting opinion criticizing New York's attorney disciplinary procedures as being unconstitutional and two Supreme Court justices voted to hear the matter on its merits.

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.". The First Amendment applies to New York. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

"The rules governing the professional conduct of attorneys in large measure regulate communication and expression, and not just non-expressive conduct, thus implicating the First Amendment in their application." *State ex rel. Oklahoma Bar Assn. v. Minter*, 2001 Ok. 69, 37 P.3d 763, 774-5, note 55 (2001). See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. at 653, note 15. The First Department suspended Petitioner's right to practice law. Such an order prohibits Petitioner's speech before the courts and prohibits his speech to clients. Furthermore, Petitioner is being punished by New York for the exercise of his speech rights in Connecticut – speech which has been highly critical of Connecticut's judicial administration. Petitioner's "words were directed at public officials and their conduct in office." [11] *Gentile v. State Bar of Nevada*,

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[11] Petitioner argued before Connecticut's Appellate Court that the Connecticut Superior Court judge's "purpose in instituting his disciplinary proceeding was specifically to undermine the criminal proceeding to prevent that proceeding from becoming an embarrassment to his administration." (Appellate Court Opposition to State's Motion to Dismiss; Board Response to Statement of Bar Counsel, p. 30.) At the time, the judge was "negotiating within the judicial branch administration for his next posting" (District of Columbia Board on Professional Responsibility Response to Statement of Bar Counsel, p. 33.) As Petitioner argued, Connecticut "[j]udges who bring disrespect upon the judiciary often find themselves

501 U.S. 1030, 1034 (1991) (Kennedy, J.). Speech "relating to alleged governmental misconduct ... has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990).

> The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations. See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-839 (1978). "[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). Public vigilance serves us well, for "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.... Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *In re Oliver*, 333 U.S. [at] 270-271.

Gentile, 501 U.S. at 1035 (Kennedy, J.).

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punished through the system of assignments". Id. "Connecticut judges speak of [this as] being 'sent to Siberia'". Id (quoting Lynne Tuohy, *Rowland Sowed Judicial Scandal*, Hartford Courant, 30 April 2006). Petitioner has argued that the problems within the Connecticut judiciary stem from ex-Governor Rowland who "was sent to prison for corruption and is currently on probation." Id., citing *Mr. Rowland: After The Fall*, Hartford Courant, 20 June 2007.

> [I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co. v. Sullivan*, [376 U.S. 254, 284-286 (1964)]. See also *NAACP v. Claiborne Hardware, Co.*, 458 U.S. 886, 933-934 (1982); *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6, 11 (1970); *St. Amant v. Thompson*, 390 U.S. 727, 732-733 (1968).

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984). This is especially true where "there is no intermediate court, and [the appellate court is] the only court of review." *Easley v. Cromartie*, 532 U.S. 234, 243 (2001).

Neither the First Department, in its roll as a reviewing court in a reciprocal discipline matter, nor the Court of Appeals in its roll as an appellate court, fulfill their obligation to "make an independent examination of the whole record" in cases, such as this, which allege the infringement of First Amendment protected core speech. Indeed, in Petitioner's case, the New York courts' failure to afford any sort of review is particularly egregious as Petitioner is still awaiting appellate review of the trial court judge's actions in the original disciplining state.

CONCLUSION

A writ of certiorari should issue so that this Court can consider the matter on its merits and in particular, consider whether *Selling* has a roll to play in state reciprocal discipline.

Respectfully submitted,

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APPENDIX

A. Unpublished order of the Honorable Francis J. Foley, III, Connecticut Superior Court Administrative Judge, Judicial District of Windham (18 July 2005)

Docket No. MI04-6287590
Judicial District of Windham at Danielson
July 18, 2005

State of Connecticut
vs
Stephen John Williams
Juris # 309679

Memorandum of Decision
Order to Show Cause re: Attorney discipline

On or about April 29, 2004, the respondent, Stephen John Williams was stopped within the judicial district of Windham for a motor vehicle offense, namely speeding. The respondent who is admitted to the practice of law in Connecticut elected not to pay the $148 speeding ticket and elected to contest the infraction.

While the respondent has a Connecticut address of 12 September Road, Storrs, CT, he listed a street address in Hong Kong, China as his address on the Complaint Ticket. At some point in time the respondent provided the Central Infraction Bureau with a post office box, 6572, in Hong Kong. It further appears from the file that the Central Infraction Bureau and the clerks of the court in GA 11, have used that post office box address for most

correspondence. For reasons not explained, the respondent closed the post office box on July 15, 2004. Thereafter, the Connecticut authorities continued to use the Hong Kong post office box to contact the defendant. It may also be noted that normal postage as used by the Connecticut authorities, is insufficient for international *airmail.* Regular mail travels at the slower surface rate.

A notice was sent to the respondent for a court appearance on November 5, 2004. He failed to appear. The case was closed out pursuant to General Statute 14-140. The Commissioner of Motor Vehicles office sent notice of suspension of respondent's Connecticut driving privileges. On February 23, 2005 the respondent alleges that he was stopped by police while in Manchester, Connecticut and issued a summons for operating a motor vehicle under suspension in violation of § 14-215.

Thereafter, the respondent filed lengthy manuscripted motions to reopen and a motion to waive the fee in the underlying Danielson motor vehicle case.[12] Those two motions were granted on March 16, 2005 (Riley, J). At this point, if the defendant simply provided a copy of his receipt to the Department of Motor Vehicles (DMV), his license would have been restored and he was then free to proceed to contest the underlying speeding ticket. All prior issues of the Clerk's performance or non-

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[12] A simple one page motion is available in the Clerk's office. The motions are routinely granted for any valid reason. Providing a receipt from the Clerk's office to the Department of Motor Vehicles showing the reopening results in a restoration of driving privileges. The vast majority of such matters are handled by pro se litigants.

performance or of the Commissioner of Motor Vehicles and the Central Infraction Bureaus' [sic] obligations were a nullity and of profound irrelevance and inconsequence since Mr. Williams had been restored to the *status quo ante*. Mr. Williams did not pursue the simple procedures easily followed by the lay persons who come before the court upon reopening their cases.

Mr. Williams could have either withdrawn his motion for mandamus or marked the motion "off". The respondent instead pursued a series of letters and pleadings each of which bespeak of his impracticality and unfamiliarity with Connecticut rules of practice. For reasons which are not apparent to the court, Mr. Williams pursued the motion for mandamus, seeking relief, wholly unnecessary to the restoration of his driving privileges. The respondent simultaneously filed letters with the Deputy Clerk of the Court instructing her on his intentions to call her as a witness, to bring all copies of regulations, guidelines and rules regarding notices to defendants [sic] and threatening to subpoena also the commissioner of motor vehicles. This correspondence, all on Mr. Williams' legal letterhead indicated to the clerk that this was in the nature of a separate adversarial proceeding and indicated that she, the clerk, should consider hiring independent legal counsel. Mr. Williams also advised the deputy clerk that "the prosecution has no role in this matter. I also believe it would be an ethical violation for the office of the prosecutor to represent your interests before the Court due to the obvious conflict of interest." The deputy clerk subsequently brought this matter to the attention of the undersigned Administrative Judge. Because of the highly

irregular approach to this simple motor vehicle matter, on April 22, 2005 the Court issued an order to show cause to the respondent ordering him to appear and show cause why he should not be disciplined or suspended until such time as he completes approved course in legal ethics and Connecticut Practice and Procedure.

The order to show cause has been before the court on numerous occasions, each time the court has advised Mr. Williams to secure the benefit of counsel since his right to practice law was at issue. After three continuances for the respondent to obtain counsel, the respondent appeared again, saying he was unable to secure a lawyer willing to undertake to represent him. The respondent's dilatory pleadings and failure to appear with counsel cannot be allowed to continue. That, in itself, is a passive form of obstructing the administration of justice.

The respondent, through his letters and pleadings has created a situation for himself wholly disproportionate to the underlying speeding infraction. Each of the pleadings in the file, which are a matter of record, and the letters which have been marked as court exhibits, obfuscate, inflame and attenuate a simple legal proceeding. This court is extremely concerned that Mr. Williams' ability to parlay a simple motor vehicle hearing into a monumental, unnecessary, time-consuming, labor-intensive and ineffectual attack on the Deputy Clerk of the Court, the Central Infraction Bureau and the Commissioner of Motor Vehicles constitutes a danger to the administration of justice and to the citizens of Connecticut who might unwittingly engage his ponderous services.

Mr. Williams testified at the direction of the court on June 10, 2005. The court denied the motion for mandamus since it was not a proper motion nor in accordance with the Practice Book. Neither §23-46 not §23-47 permit mandamus on a simple motion. It must be brought by writ, summons and complaint or by an order to show cause in an existing case. The court finds clear and convincing evidence that the respondent's use of this motion and the supporting letters to the deputy Clerk of Court and to the Assistant State's Attorney were abusive of both process and procedure. Pursuing the improperly filed motion after the court had granted the motion to open and motion to waive the fee was an entirely unnecessary, vexing and burdensome procedure. The court is satisfied that even at this date, the respondent does not understand the proper procedure familiar to even lay litigants to obtain a restoration of their driving privileges. Neither does he appreciate the distress to others and the burdens his conduct creates to the efficient administration of justice.

The respondent under questioning by the court indicated that he was unsure of the date he was admitted to the bar but believed it to be around 1989, 1990 or 1991. He indicates he resides in Hong Kong, he has a house there, and he also lives in Connecticut. He indicates he has never represented a client and does not do anything for a living. Nonetheless, he is authorized to practice law and the court finds that he is, at present, not fit to practice before the courts of this state in the capacity of a Commissioner of the Superior Court.

ORDER

The court finds by clear and convincing evidence based upon the pleadings, letters and conduct before the court that Stephen John Williams should be suspended from the practice of law in order to safeguard the administration of justice and to protect the public from the unfitness of this respondent. The conduct of pursuing a meritless mandamus and intimidating the Deputy Clerk with improper unsolicited advice violates the Rules of Professional Conduct set forth in Practice Book [sic] § 1.1 Competence, to wit failure to abide by Practice Book Rules regarding pleadings; § 3.5(3) engaging in conduct intended to disrupt the tribunal; Practice Book [sic] § 4.4 Respect for the rights of third persons; and §8.4 [sic] engaging in conduct prejudicial to the administration of justice.

Since the respondent does not presently engage in the active practice of law, a suspension will not disrupt any clients nor impose a financial hardship upon him. It will provide an opportunity for the respondent to inform himself regarding appropriate ethical conduct for attorneys and to familiarize himself with the rules of Connecticut practice and procedure if he wishes to practice as an attorney before the courts of this state.

Accordingly pursuant to §51-84 and to the inherent power of the court to inquire into the conduct of Commissioners of the Superior Court, Stephen John Williams is suspended for the practice of law for a period of six months. As a condition of his readmission he shall complete a Connecticut Bar Association approved course of instruction on legal

ethics and Connecticut Practice and Procedure. The conditions for readmission shall be monitored by the statewide bar counsel.

This order shall be effective twenty days from the date of this order. Notice of this order shall be published in accordance with Practice Book rule § 2-54.

Judgement [sic] may enter accordingly at Danielson, Connecticut the 18th day of July 2005.

/s/
Foley, J.
Administrative Judge
Judicial District of Windham

Copies:
The Respondent
Clerk of the Court, Francis Orszulak
Statewide Bar Counsel

B. *In re Williams*, 33 A.D.3d 38, 819 N.Y.S.2d 508 (1st Dept., 2006)

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on July 27, 2006.

Present – Hon. John T. Buckley, Presiding Justice, David Friedman, George D. Marlow, Eugene Nardelli, James M. McGuire, Justices

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In the Matter of Stephen J. Williams (admitted as Stephen John Williams), an attorney and counselor-at-law;

Departmental Disciplinary Committee for the First Judicial Department, Petitioner

Stephen J. Williams, Respondent

M-337, M-1217

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The Departmental Disciplinary Committee for the First Judicial Department, by Thomas J. Cahill, its Chief Counsel (Stephen P. McGoldrick, of counsel), having presented a petition to this Court on March 6, 2006, seeking an order pursuant to the doctrine of reciprocal discipline as set forth in 22 NYCRR 603.3, suspending respondent (who, as Stephen John Williams, was admitted to practice as an attorney and counselor-at-law in the Supreme Court of the First Judicial Department on August 7, 1989), from the practice of law in the State of New York for a period of six months predicated upon similar discipline issued by a decision and order of the Superior Court of the State of Connecticut, Judicial District of Windham, dated July 18, 2005 finding that respondent had committed professional misconduct by (1) failing to practice law in a competent manner; (2) engaging in conduct intended to disrupt a tribunal; (3) failing to respect the rights of third persons and (4) engaging in conduct prejudicial to the administration of justice and suspending respondent from the practice of law in the State of Connecticut for a period of six months,

And respondent pro se having cross moved by separate notices to (1) unseal the instant proceeding to Judiciary Law § 90(10), (2) to compel the Committee to provide respondent with a statement of the specific facts in support of allegations of professional misconduct and, (3) a demand for a hearing,

And the Departmental Disciplinary Committee, by Thomas J. Cahill, its Chief counsel (Stephen P. McGoldrick, of counsel), having submitted a reply to respondent's cross-motion,

Now, upon reading and filing the papers with respect to the petition and the cross motion(s), and due deliberation having been had thereon, and upon the Opinion Per Curiam filed herein, it is unanimously,

Ordered that the petition is granted and respondent is suspended from the practice of law in the State of New York for a period of six months, nunc pro tunc to July 18, 2005, until such time as respondent applies for reinstatement as an attorney and counselor-at-law in the State of New York, and until further order of this Court (M-337), and it is further,

Ordered that respondent's cross motion to unseal, compel and to set the matter down for a hearing is denied, and it is further,

Ordered that respondent is commanded to desist and refrain from the practice of law in any form, either as principal or agent, clerk or employee of another; that respondent is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice,

board, commission or other public authority; that respondent is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto until such time as respondent applies for reinstatement as an attorney and counselor-at-law in the State of New York and until further order of this Court. Respondent is directed to fully comply with the provisions of Title 22, Section 603.13, of the Rules of this Court, a copy of which is annexed hereto and made a part hereof. [sic – a copy of 22 NYCRR § 603.13 was not annexed to the order.]

ENTER: /s/ CLERK

SUPREME COURT, APPELLATE DIVISION
First Judicial Department, March 2006

John T. Buckley, Presiding Justice, David Friedman, George D. Marlow, Eugene Nardelli, James M. McGuire, Justices

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In the Matter of Stephen J. Williams (admitted as Stephen John Williams), an attorney and counselor-at-law;

Departmental Disciplinary Committee for the First Judicial Department, Petitioner

Stephen J. Williams, Respondent

M-337, M-1217

----------x

Disciplinary proceedings instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent, as Stephen John Williams, was admitted to the Bar of the State of New York at a Term of the Appellate Division of the Supreme Court for the First Judicial Department on August7, 1989.

Thomas J. Cahill, Chief Counsel, Departmental Disciplinary Committee, New York City (Stephen P. McGoldrick of counsel), for petitioner.

Respondent pro se.

Motions – 337 & 1217 – March 6, 2006.

In the Mater of STEPHEN J. WILLIAMS, an attorney

PER CURIAM

Respondent Stephen J. Williams was admitted to the practice of law in the State of New York by the First Judicial Department on August 7, 1989. Respondent was also admitted to the practice of law in Connecticut on June 5, 1989.

The Departmental Disciplinary Committee seeks an order pursuant to 22 NYCRR 603.3 and Judiciary Law § 90(2) suspending respondent for a period of six months predicated upon similar discipline issued by the Superior Court of the State of Connecticut.

In April 2004, respondent was cited for speeding while driving in Connecticut. Respondent challenged the infraction, which carried a penalty of

approximately $148, but failed to appear on the date noticed by the court. As a result of his failure to appear, the case was closed, and the Connecticut Department of Motor Vehicles sent respondent notification of the suspension of his Connecticut driving privileges.

On February 23, 2005, respondent was stopped by police in Manchester, Connecticut and issued a summons for operating a motor vehicle with a suspended license. Respondent subsequently made motions to reopen the case regarding his speeding violation and to waive a filing fee, which Superior Court granted.

Respondent sought to have his driving privileges restored pending the resolution of his reopened traffic case, and a simplified procedure that would have allowed him readily to do so was available. However, respondent chose to file several motions aimed at obtaining that relief, including a "motion for mandamus" to, among other things, require the clerk of the court to account as to why the traffic case had been referred to the Department of Motor Vehicles. Respondent sent a letter, dated April 7, 2005, on his legal letterhead, to the deputy clerk of the court informing her that respondent intended to call her as a witness. In this letter, respondent indicated that the proceeding for the writ was a separate adversarial proceeding, that it would be an ethical violation for the state attorney's office to appear on the deputy clerk's behalf, and that the deputy clerk should consider hiring independent legal counsel.

The deputy clerk alerted Superior Court of respondent's conduct, and, on April 22, 2005, the court issued an order to show cause to respondent ordering him to appear and show cause why he should not be disciplined or suspended until such time as he completes an approved course in legal ethics and Connecticut practice and procedure. The court stated that the charges of misconduct were premised upon alleged violations of four Connecticut Rules of Professional Conduct (RPC), namely: (1) failure to practice law in a competent manner (RPC 1.1), (2) engaging in conduct intended to disrupt a tribunal (RPC 3.5 [3]), (3) failing to respect the rights of a third party (RPC 4.4) and (4) engaging in conduct prejudicial to the administration of justice (RPC 8.4 [4]). In response to the order to show cause, respondent made a motion to "quash" the order, and requested an adjournment of the May 13 return date. The court granted the application to adjourn the matter.

On June 10, 2005, respondent appeared before the court to answer the order to show cause. The court denied respondent's motion to quash the order to show cause and for a writ of mandamus; with regard to the latter, the court subsequently noted that it was "abusive of both process and procedure." The court then placed respondent under oath and attempted to question him regarding his conduct. However, respondent requested that the proceeding be adjourned to afford him an opportunity to consult with counsel. The court granted this request and adjourned the proceeding to July 18, 2005.

Respondent appeared before the court on July 18 and claimed that he had searched for but was unable to

find an attorney who was willing to represent him. The court, noting that the matter had already been adjourned multiple times to afford respondent an opportunity to retain counsel, ruled that the proceeding would continue. Respondent, despite being given the opportunity to do so, declined to testify.

By a decision and order dated July 18, 2005, the court found that respondent committed professional misconduct by: (1) failing to practice law in a competent manner, (2) engaging in conduct intended to disrupt a tribunal, (3) using methods of obtaining evidence that violated the rights of a third person and (4) engaging in conduct prejudicial to the administration of justice. The court suspended respondent from the practice of law for six months. Respondent's reinstatement was conditioned upon his completion of a Connecticut Bar Association approved course on legal ethics and Connecticut practice and procedure.

In a proceeding seeking reciprocal discipline pursuant to 22 NYCRR 603.3, respondent is precluded from raising any defenses except: (1) lack of notice constituting a deprivation of due process; (2) an infirmity of the proof presented to the foreign jurisdiction; or (3) that the misconduct for which the attorney was disciplined in the foreign jurisdiction does not constitute misconduct in this state (*see Matter of Power*, 3 AD3d 21, 23 [2003]).

Here, respondent was provided with ample notice of the disciplinary action and an opportunity to answer the charges of misconduct asserted against him. The findings of misconduct were based on documentary

evidence generated by respondent, particularly the motion for mandamus and the April 7 letter, and there was no infirmity of proof. Finally, respondent's actions would constitute misconduct in this state (see Code of Professional Responsibility DR 1-102 [a] [5] [conduct prejudicial to the administration of justice]; DR 6-101 [failing to act competently]; DR 7-106 [c] [6] [undignified or discourteous conduct degrading to a tribunal]).

With regard to the appropriate sanction, this Court normally defers to the sanction determination made in the state where the misconduct occurred (*see Matter of Power*, 3 AD3d at 24) and we adopt the six-month suspension imposed upon respondent by the Superior Court of the State of Connecticut, Judicial District of Windham.

Accordingly, the petition should be granted and respondent suspended from the practice of law for a period of six months, and until such time as he applies for reinstatement. Respondent's cross motion to unseal and compel, and for a hearing should be denied.

All concur.

Order filed.

C. Unpublished First Department order (16 November 2006)

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on November 16, 2006.

Present – Hon. John T. Buckley, Presiding Justice, David Friedman, George D. Marlow, Eugene Nardelli, James M. McGuire, Justices

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In the Matter of Stephen J. Williams (admitted as Stephen John Williams), a suspended attorney:

Departmental Disciplinary Committee, for the First Judicial Department, Petitioner

Stephen J. Williams, Respondent

M-4714, M-4863

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An order of this Court having been entered on July 27, 2006 (M-227/M-1217), inter alia, suspending respondent (who, as Stephen John Williams, was admitted to practice as an attorney and counselor-at-law in the State of New York at a Term of the Appellate Division of the Supreme Court for the First Judicial Department on August 7, 1989) from the practice of law in the State of New York for a period of six months, nunc pro tunc to July 18, 2005, pursuant to the doctrine of reciprocal discipline, as set forth in 22 NYCRR §603.3, predicated upon similar discipline imposed upon respondent by an order of the Superior Court of the State of Connecticut, Judicial District of Windham, dated July 18, 2005, until such time as respondent applied for reinstatement and until further order of this Court.

And respondent pro se having moved for an order vacating the order of this Court entered on July 27, 2006 (N-337/M-1217), and for a refund of the motion filing fee [M-4714]; and, by separate motion, respondent having moved for leave to appeal to the Court of Appeals from the aforesaid order of this Court entered on July 27, 2006, which suspended respondent as an attorney and counselor-at-law (M-4863),

And the Departmental Disciplinary Committee, by Thomas J. Cahill, its Chief Counsel (Stephen P. McGoldrick, of counsel), having submitted answering affirmations seeking denial of the aforesaid motions,

Now, upon reading and filing the papers with respect to the motions, and due deliberations having been had thereon,

It is ordered that the motions are denied, without prejudice to an application for reinstatement upon a demonstration of compliance with 22 NYCRR 603.14(a)(1), including payment of the requisite $315 fee (CPLR 8022[b]).

ENTER: /s/ DEPUTY CLERK, Clerk

D. *In re Williams*, 8 N.Y.3d 858, 863 N.E.2d 109, 831 N.Y.S.2d 105 (2007)

In the Matter of Stephen J. Williams (Admitted as Stephen John Williams), an Attorney, Appellant. Departmental Disciplinary Committee for the First Judicial Department, Respondent.
Court of Appeals of New York
Submitted January 16, 2007

Decided February 15, 2007

Motion, insofar as it seeks leave to appeal from the Appellate Division order denying appellant's motions for reconsideration and for leave to appeal to the Court of Appeals, dismissed upon the ground that such order does not finally determine the proceeding within the meaning of the Constitution; motion for leave to appeal otherwise denied.
Judge Jones taking no part.

E. *Williams v. Departmental Disciplinary Committee for First Judicial Dept.*, 8 N.Y.3d 1007, 870 N.E.2d 687, 839 N.Y.S.2d 448 (2007)

In the Matter of Stephen J. Williams (Admitted as Stephen John Williams), an Attorney, Appellant.
Departmental Disciplinary Committee for the First Judicial Department, Respondent.
Court of Appeals of New York
Submitted April 23, 2007
Decided June 7, 2007

On the Court's own motion, appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved. Motion for sanctions denied.

F. *Williams v. Departmental Disciplinary Committee for First Judicial Dept.*, 9 N.Y.3d 919, 875 N.E.2d 892, 844 N.Y.S.2d 173 (2007)

In the Matter of Stephen J. Williams (Admitted as Stephen John Williams), an Attorney, Appellant.

Departmental Disciplinary Committee for the First Judicial Department, Respondent.
Court of Appeals of New York
Submitted July 23, 2007
Decided September 18, 2007

Motion for reargument denied.

G. U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

H. U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

I. N.Y. Const. Art. VI, § 3.b(1)

Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section....

In civil cases and proceedings as follows:

(1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

J. Judiciary Law § 90(2)

The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

It shall be the duty of the appellate division to insert in each order of suspension or removal hereafter rendered a provision which shall command the attorney and counsellor-at-law thereafter to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of

another. In addition it shall forbid the performance of any of the following acts, to wit:

a. The appearance as an attorney or counsellor-at-law before any court, judge, justice, board, commission or other public authority.

b. The giving to another of an opinion as to the law or its application, or of any advice in relation thereto.

In case of suspension only, the order may limit the command to the period of time within which such suspension shall continue, and if justice so requires may further limit the scope thereof.

If an attorney and counsellor-at-law has been heretofore removed from office, the appellate division shall upon application of any attorney and counsellor-at-law, or of any incorporated bar association, and upon such notice to the respondent as may be required, amend the order of removal by adding thereto as a part thereof, provisions similar to those required to be inserted in orders hereafter made.

If a certified copy of such order or of such amended order, be served upon the attorney and counsellor-at-law suspended or removed from office, a violation thereof may be punished as a contempt of court.

K. Judiciary Law § 90(6)

Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is

established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and counsellor-at-law must be allowed to defend himself against such charges.

The justices of the appellate division in any judicial department, or a majority of them, may make an order directing the expenses of any disciplinary proceedings, and the necessary costs and disbursements of the petitioner in prosecuting such charges, including the expense of any preliminary investigation in relation to professional conduct of an attorney and counsellor-at-law, to be paid out of funds appropriated to the office of court administration for that purpose.

L. 22 NYCRR § 603.3

(a) Any attorney to whom this Part shall apply, pursuant to section 603.1 of this Part who has been

disciplined in a foreign jurisdiction, may be disciplined by this court because of the conduct which gave rise to the discipline imposed in the foreign jurisdiction. For purposes of this Part, foreign jurisdiction means another state, territory or district.

(b) Upon receipt of a certified or exemplified copy of the order imposing such discipline in a foreign jurisdiction, and of the record of the proceeding upon which such order was based, this court, directly or by the Departmental Disciplinary Committee, shall give written notice to such attorney pursuant to subdivision 6 of section 90 of the Judiciary Law, according him the opportunity, within 20 days of the giving of such notice, to file a verified statement setting forth evidentiary facts for any defense to discipline enumerated under subdivision (c) of this section, and a written demand for a hearing at which consideration shall be given to any and all such defenses. Such notice shall further advise the attorney that in default of such filing such discipline or such disciplinary action as may be appropriate will be imposed or taken. When a verified statement setting forth evidentiary facts for any defense to discipline and a demand for hearing have been duly filed, no discipline shall be imposed without affording the attorney an opportunity for hearing. The court may conduct the hearing or it may appoint a referee to conduct the hearing and further refer the matter to the Departmental Disciplinary Committee. In the event the committee or the attorney desires further action by this court, a petition may be filed in this court together with the record of the proceedings before the committee.

(c) Only the following defenses may be raised:

(1) that the procedure in the foreign jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
(2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not, consistent with its duties, accept as final the finding in the foreign jurisdiction as to the attorney's misconduct; or
(3) that the misconduct for which the attorney was disciplined in the foreign jurisdiction does not constitute misconduct in this jurisdiction.

(d) Any attorney to whom these rules shall apply pursuant to section 603.1 of this Part who has been disciplined in a foreign jurisdiction shall promptly advise this court of such discipline.

(e) Whenever the Departmental Disciplinary Committee learns that an attorney to whom these rules shall apply, pursuant to section 603.1 of this Part, has been disciplined in a foreign jurisdiction, it shall ascertain whether a certified or exemplified copy of the order imposing such discipline has been filed with this court, and if it has not been filed, such committee shall cause such order to be filed.

M. 22 NYCRR § 691.3

(a) Any attorney to whom this Part shall apply, pursuant to section 691.1 of this Part, who has been disciplined in another state, territory or district, may be disciplined by this court because of the conduct which gave rise to the discipline imposed in such other state, territory or district.

(b) Upon receipt from the foreign jurisdiction of a certified or exemplified copy of the order imposing such discipline and of the record of the proceedings upon which such order was based, this court, directly or by a committee appointed pursuant to section 691.4(a) of this Part, shall give written notice to such attorney pursuant to subdivision 6 of section 90 of the Judiciary Law, according him the opportunity, within 20 days of the giving of such notice, to file a verified statement setting forth any defense to a discipline enumerated under subdivision (c) of this section, and a written demand for a hearing at which consideration shall be given to any and all defenses enumerated in said subdivision (c) of this section. Such notice shall further advise the attorney that, in default of such filing by him, this court will impose such discipline or take such disciplinary action as it deems appropriate.

(c) This court, in default of the attorney's filing a verified statement and demand as provided for in subdivision (b) of this section, may discipline such attorney unless an examination of the entire record before this court, including the record of the foreign jurisdiction and such other evidence as this court in its discretion may receive, discloses (1) that the procedure in the foreign jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not, consistent with its duties, accept as final the finding of the court in the foreign jurisdiction as to the attorney' s misconduct; or (3) that the imposition of discipline by this court would be unjust.

(d) Opportunity for hearing. Where an attorney shall have duly filed both his verified statement setting forth any defense (as enumerated in subdivision [c] of this section) to the imposition of discipline by this court and his written demand for a hearing with respect to such defense, no discipline, by way of suspension or otherwise, shall be imposed without affording the attorney an opportunity to have a hearing.

(e) Any attorney to whom this Part shall apply who has been disciplined in a foreign jurisdiction shall promptly advise this court of such discipline

N. D.C. Bar Rule XI, § 11(c)

Standards for reciprocal discipline. Reciprocal discipline shall be imposed unless the attorney demonstrates, by clear and convincing evidence, that:
(1) The procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
(2) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistently with its duty, accept as final the conclusion on that subject; or
(3) The imposition of the same discipline by the Court would result in grave injustice; or
(4) The misconduct established warrants substantially different discipline in the District of Columbia; or
(5) The misconduct elsewhere does not constitute misconduct in the District of Columbia.
Unless there is a finding by the Board under (1), (2), or (5) above that is accepted by the Court, a final determination by a disciplining court outside the

District of Columbia or by another court in the District of Columbia that an attorney has been guilty of professional misconduct shall conclusively establish the misconduct for the purpose of a reciprocal disciplinary proceeding in this Court.

O. D.C. Bar Rule XI, § 11(d)

Temporary suspension and show cause order. Upon receipt of a certified copy of an order demonstrating that an attorney subject to the disciplinary jurisdiction of this Court has been suspended or disbarred by a disciplining court outside the District of Columbia or by another court in the District of Columbia, the Court shall forthwith enter an order suspending the attorney from the practice of law in the District of Columbia pending final disposition of any reciprocal disciplinary proceeding, and directing the attorney to show cause within thirty days from the date of the order why the identical discipline should not be imposed. The attorney's response to the order to show cause shall be filed with the Board, which for good cause shown may extend the time for filing a response for a period not to exceed thirty days.

P. Sup. Ct. R. 8.1

Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, the Court will enter an order suspending that member from practice before this Court and affording the member an opportunity to show cause, within 40 days, why a disbarment order should not be entered.

Upon response, or if no response is timely filed, the Court will enter an appropriate order.

Q. Standing Committee on Professional Discipline, Model Rules for Lawyer Disciplinary Enforcement II, Procedure For Disciplinary Proceedings, Rule 22. Reciprocal Discipline And Reciprocal Disability Inactive Status

(A) Disciplinary Counsel Duty to Obtain Order of Discipline or Disability Inactive Status from Other Jurisdiction. Upon being disciplined or transferred to disability inactive status in another jurisdiction, a lawyer admitted to practice in this jurisdiction shall promptly inform disciplinary counsel of the discipline or transfer. Upon notification from any source that a lawyer within the jurisdiction of the agency has been disciplined or transferred to disability inactive status in another jurisdiction, disciplinary counsel shall obtain a certified copy of the disciplinary order and file it with the board and with the court.

(B) Notice Served Upon Respondent. Upon receipt of a certified copy of an order demonstrating that a lawyer admitted to practice in name of jurisdiction has been disciplined or transferred to disability inactive status in another jurisdiction, the court shall forthwith issue a notice directed to the lawyer and to disciplinary counsel containing:

(1) A copy of the order from the other jurisdiction; and
(2) An order directing that the lawyer or disciplinary counsel inform the court, within [thirty] days from service of the notice, of any claim by the lawyer or

disciplinary counsel predicated upon the grounds set forth in paragraph D, that the imposition of the identical discipline or disability inactive status in this jurisdiction would be unwarranted and the reasons for that claim.

(C) Effect of Stay in Other Jurisdiction. In the event the discipline or transfer imposed in the other jurisdiction has been stayed there, any reciprocal discipline or transfer imposed in this jurisdiction shall be deferred until the stay expires.

(D) Discipline to be Imposed. Upon the expiration of [thirty] days from service of the notice pursuant to the provisions of paragraph B, this court shall impose the identical discipline or disability inactive status unless disciplinary counsel or the lawyer demonstrates, or this court finds that it clearly appears upon the face of the record from which the discipline is predicated, that:

(1) The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
(2) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept as final the conclusion on that subject; or
(3) The discipline imposed would result in grave injustice or be offensive to the public policy of the jurisdiction;
(4) The reason for the original transfer to disability inactive status no longer exists.

If this court determines that any of those elements exists, this court shall enter such other order as it

deems appropriate. The burden is on the party seeking different discipline in this jurisdiction to demonstrate that the imposition of the same discipline is not appropriate.

(E) Conclusiveness of Adjudication in Other Jurisdictions. In all other aspects, a final adjudication in another jurisdiction that a lawyer, whether or not admitted in that jurisdiction, has been guilty of misconduct or should be transferred to disability inactive status shall establish conclusively the misconduct or the disability for purposes of a disciplinary or disability proceeding in this jurisdiction.

Commentary
If a lawyer suspended or disbarred in one jurisdiction is also admitted in another jurisdiction and no action can be taken against the lawyer until a new disciplinary proceeding is instituted, tried, and concluded, the public in the second jurisdiction is left unprotected against a lawyer who has been judicially determined to be unfit. Any procedure which so exposes innocent clients to harm cannot be justified. The spectacle of a lawyer disbarred in one jurisdiction yet permitted to practice elsewhere exposes the profession to criticism and undermines public confidence in the administration of justice.

Disciplinary counsel in the forum jurisdiction should be notified by disciplinary counsel of the jurisdiction where the original discipline or disability inactive status was imposed. Upon receipt of such information, disciplinary counsel should promptly obtain and serve upon the lawyer an order to show cause why identical discipline or disability inactive

status should not be imposed in the forum jurisdiction. The certified copy of the order in the original jurisdiction should be incorporated into the order to show cause.

The imposition of discipline or disability inactive status in one jurisdiction does not mean that every other jurisdiction in which the lawyer is admitted must necessarily impose discipline or disability inactive status. The agency has jurisdiction to recommend reciprocal discipline or disability inactive status on the basis of public discipline or disability inactive status imposed by a jurisdiction in which the respondent is licensed. The agency should consider any difference, in kind or scope, between the sanction imposed in the originating jurisdiction and the sanctions available in the forum jurisdiction.

A judicial determination of misconduct or disability by the respondent in another jurisdiction is conclusive, and not subject to relitigation in the forum state. The court should impose identical discipline or disability inactive status unless it determines, after review limited to the record of the proceedings in the foreign jurisdiction, that one of the grounds specified in paragraph D exists. This Rule applies whether or not the respondent is admitted to practice in that jurisdiction. See also Model Rule 8.5, Comment [1], Model Rules of Professional Conduct.